

## REMARKS

This Amendment is submitted in reply to the non-final Office Action dated April 1, 2010. A petition for a two month extension of time is submitted herewith. The Director is authorized to charge \$490.00 for the two month extension of time, and any additional fees that may be required, or to credit any overpayment to Deposit Account No. 02-1818. If such a withdrawal is made, please indicate the Attorney Docket No. 3712036-750 on the account statement.

Claims 1-12 are pending in this application. In the Office Action, Claims 1-12 are objected to; Claim 2 is rejected under 35 U.S.C. §112; and Claims 1-12 are rejected under 35 U.S.C. §103. In response, Claims 1-12 have been amended. The amendments do not add new matter. In view of the amendments and/or for the reasons set forth below, Applicants respectfully submit that the rejections should be withdrawn.

In the Office Action, Claims 1-12 are objected to. In response, Applicants have amended Claims 1-12 to address the informalities cited by the Patent Office and for clarification purposes.

In the Office Action, Claim 2 is rejected under 35 U.S.C. §112, second paragraph, as being indefinite. More specifically, the Patent Office alleges that the phrase "proteins, the majority of which are provided by monopasteurized milk" is unclear. In response, Applicants have amended Claim 2 for clarification purposes. The amendment is supported in the specification, for example, at page 2, lines 23-25. Based on at least these noted reasons, Applicants believe that Claim 2 fully complies with 35 U.S.C. §112, second paragraph. Accordingly, Applicants respectfully request that the rejection of Claim 2 under 35 U.S.C. §112 be withdrawn.

In the Office Action, Claims 1-4, 6 and 12 are rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 4,552,773 to Kahn et al. ("*Kahn*"). Claims 7-11 are rejected under 35 U.S.C. §103(a) as being unpatentable over *Kahn* in further view of WO 01/06865 to Vaghela et al. ("*Vaghela*"). Applicants respectfully traverse the rejections for at least the reasons set forth below.

Independent Claims 1, 7 and 11-12 recite, in part, an aerated frozen confection comprising a vegetable fiber selected from the group consisting of oat fibers, fibers extracted from chicory taproots and combinations thereof. In contrast, Applicants respectfully submit that

the cited references fail to disclose or suggest each and every element of independent Claims 1, 7 and 11-12.

“One way for a patent applicant to rebut a prima facie case of obviousness is to make a showing of ‘unexpected results,’ i.e., to show that the claimed invention exhibits some superior property or advantage that a person of ordinary skill in the relevant art would have found surprising or unexpected.” *In re Soni*, 54 F.3d 746, 750 (Fed. Cir. 1995). Applicants have surprisingly found that the claimed aerated frozen confections comprising a vegetable fiber selected from the group consisting of oat fibers, fibers extracted from chicory taproots and combinations thereof have high resistance to shrinkage and layering.

There are problems in achieving stability of a very soft ice cream packed in cups or bulk containers. Inside the ice cream, there are ice crystals and air bubbles dispersed in a liquid phase. Softness generally is obtained by reducing the quantity of ice formed. This is mainly obtained by selecting the type and the amount of sugars and by adding salt or alcohol in the ice cream mix. There are limitations with using the low molecular components mentioned above for taste reasons. Thus, if further increase of softness is targeted, the only possibility is to use polyols, e.g., glycerol, which increases the risk of shrinkage. Shrinkage is a serious problem that makes the product unacceptable to the consumer – the volume of the ice cream shrinks, leaving a space either at the top or at the side of the package, which then appears unfull.

Unfortunately, the problem of instability increases with the volume of the liquid phase. Without willing to be bound by theory, when the volume of the liquid phase raises, the air bubbles have a tendency to go up, which may lead to the formation of a layer of ice at the bottom of the container. This default is called layering.

Applicants have surprisingly found a way to provide increased stabilization of soft serve ice cream type of products for home use with high resistance to shrinkage and layering. For example, Applicants surprisingly found that vegetable fibers selected from the group consisting of oat fibers, fibers extracted from chicory taproots and combinations thereof have a strong effect on preventing shrinkage and ice layering in aerated frozen confections even in the presence of glycerol. See specification, Examples.

*Kahn* and *Vaghela* alone or in combination fail to disclose an aerated frozen confection comprising a vegetable fiber selected from the group consisting of oat fibers, fibers extracted

from chicory taproots and combinations thereof as required by independent Claims 1, 7 and 11-12. In fact, nowhere do *Kahn* and *Vaghela* even disclose the use of oat fibers or fibers extracted from chicory taproots for any purpose.

What the Patent Office has done is to rely on hindsight reconstruction of the claimed invention. Applicants respectfully submit that it is only with a hindsight reconstruction of Applicants' claimed invention that the Patent Office is able to even attempt to piece together the teachings of the prior art so that the claimed invention is allegedly rendered obvious. Instead, the claims must be viewed as a whole as defined by the claimed invention and not dissected into discrete elements to be analyzed in isolation. *W.L. Gore & Assoc., Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1548, 220 USPQ 303, 309 (Fed. Cir. 1983); *In re Ochiai*, 71 F.3d 1565, 1572, 37 USPQ2d 1127, 1133 (Fed. Cir. 1995). One should not use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention. *In re Fine*, 837 F.2d at 1075. (Fed. Cir. 1988).

For at least the reasons discussed above, *Kahn* and *Vaghela* fail to teach or suggest each and every element of independent Claims 1, 7 and 11-12, along with any of the claims that depend from Claims 1, 7 and 11-12. Accordingly, Applicants respectfully request that the rejections of the pending claims under 35 U.S.C. §103(a) be withdrawn.

Claim 5 is rejected under 35 U.S.C. §103(a) as being unpatentable over *Kahn* in further view of U.S. Patent No. 5,127,956 to Hansen et al. ("*Hansen*"). Claim 5 also incorporates that limitations of Claim 1. In this regard, *Hansen* and *Kahn* alone or in combination fail to disclose or suggest an aerated frozen confection comprising a vegetable fiber selected from the group consisting of oat fibers, fibers extracted from chicory taproots and combinations thereof as required by independent Claim 1. Moreover, *Hansen* does not even disclose a frozen composition or a composition designed or capable of being frozen.

For the foregoing reasons, Applicants respectfully request reconsideration of the above-identified patent application and earnestly request an early allowance of the same. In the event there remains any impediment to allowance of the claims which could be clarified in a telephonic interview, the Examiner is respectfully requested to initiate such an interview with the undersigned.

Respectfully submitted,

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